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01-SIT-1

CALIF ENERGY COMMISSION

JUL 30 2001

RECEIVED IN DOCKETS

Commissioner Robert A. Laurie, Presiding Member
Commissioner Robert Pernell, Associate Member
Energy Facility Siting Committee
California Energy Commission
1516 9th Street
Sacramento, CA 95814

Re: Comments of the Independent Energy Producers Association:
Docket Number 01-SIT-1

Dear Commissioners Laurie and Pernell:

The Independent Energy Producers Association ("IEP") is pleased to have the opportunity to comment on the Rulemaking to Modify Rules of Practice and Procedure for Powerplant Applications (Docket 01-SIT-01). IEP thanks the Committee for its hard work in this proceeding to date and looks forward to continuing to work with the Committee on the proposed regulations.

IEP's comments focus on the Committee's draft of the initial modifications to the siting regulations. In general, IEP applauds the proposed changes as they will indeed simplify the siting process in a manner that is consistent with the public interest. IEP's specific comments are as follows.

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Committee Discretion to Facilitate Evidentiary Hearings, Section 1212(b). With regard to Section 1212(b), IEP believes that the Committee has done an excellent job of clarifying the scope of the Presiding Members' authority in the conduct of hearings. The proposed revisions support the public interest in fair and thorough examination of the issues. Specifically, IEP believes that the Committee's clarification of the Presiding Members' authority to place reasonable limitations on oral and written testimony will improve the siting process.

IEP believes that the Commission has such authority under its existing statute and regulations. Further, IEP believes that this provision will effectively implement Section 25521 which was recently added to the Public Resources Code by SB 28X (Sher). IEP also believes subsection (c) will have these same benefits. In sum, Section 1212(b) as proposed by the Committee properly clarifies the Presiding Member's authority to conduct a fair and impartial hearing in a manner that promotes the public interest.

Appropriate Deference to Other Agencies In Their Areas of Expertise, Section 1714.5(d). IEP is pleased to see the inclusion of section 1714.5(d), stating that comments received by the Commission from state agencies within the area of expertise of that agency shall be given "great deference" by the Commission Staff in their analysis, and shall be deemed to represent the position of the State of California on the subject commented upon. IEP's membership believes that this provision is a strong step in the right direction.

The exercise of deference to other agencies in their areas of expertise is both necessary and wholly consistent with the Energy Commission's responsibilities as a certified regulatory

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program. Proposed subsection (d) allows for the appropriate deference by the Commission Staff in their independent analysis of the potential impacts of a proposed project.

Contrary to some parties' strained reading of the proposed Section 1714.5(d), the Committee's language allows for substantial or "great" deference to expert agencies in their areas of expertise; it does not require the CEC Staff to accept the recommendations of other agencies without the Staff's independent analysis of the recommendations. Instead, the Energy Commission Staff will, of course, conduct its own independent review of the information received by these expert agencies, guided by "other laws of the State of California or the United States." By exercising appropriate deference, the Energy Commission Staff will fulfill its obligations under the Commission's certified regulatory program while avoiding time-consuming and duplicative reproduction of the recommendations of other agencies within their area of expertise.

Unfettered, Informal Communications Between All Parties, Including the Staff as an Independent Party, Section 1710(h). The Committee's proposed revisions to Section 1710(h) are also a step in the right direction. Specifically, IEP believes that the changes provided in the language clarify the fact that any party to a proceeding may meet with any other party during the course of the proceeding for the purpose of discussing any matter related to the project, without a publicly noticed workshop. This free and open communication properly extends to all parties, including the Commission's Staff as an independent party to the

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proceedings. Of course, this open meeting authority does not extend to the Commission's decisionmakers: the Commissioners, their Staffs, and the Hearing Officers.

The proposed clarification is necessary to allow parties to discuss issues in an open and candid forum without the need for a publicly noticed workshop. Such meetings are allowed under the Commission's current regulations. Further, such meetings add tremendous value in the sense that parties are able to meet to discuss issues in a forum that facilitates communication, avoiding the non-productive sessions where real communication often is subordinated to policy pronouncements fired back and forth across the public rostrum.

As to the specific language provided, IEP respectfully suggests one important change to the Committee's proposed revisions to Section 1710(h). IEP believes that the requirement for a record of conversation for discussions between Staff and any party may unduly burden effective and productive communication between the parties. IEP can easily foresee situations where applicants or other parties may feel compelled to file a document in response to a mandatory record of conversation if such written record is either not consistent with a party's recollection, or in some other way, incomplete. Concerns regarding the completeness of records of conversation may also have a chilling effect on communications between parties.

As set forth in existing laws and regulations, Staff is an independent party of the proceeding, not a decisionmaker. IEP firmly believes that the public's appreciation of Staff's role as an independent party depends, in part, on clear direction from the Committee in the regulations that Staff is an independent party and that all communications with Staff are allowed

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without any *ex parte* restrictions or limitations whatsoever.¹ Accordingly, IEP respectfully suggests that the language added by the committee starting with the proviso “provided that when a party meets with staff...” be deleted, as follows:

~~Nothing in this section shall prohibit an applicant from informally exchanging information or discussing procedural issues with the staff any party from meeting with any other party for the purpose of discussing any matter related to the project without a publicly noticed workshop, provided that when a party meets with staff to conduct such discussions, staff shall make a written record of the content of the discussions and shall place that writing in the docket and serve it on all parties to the proceeding.~~

Expanded Use of Informal Hearing Procedures, Section 1212(e). IEP is intrigued by, yet concerned about, the scope of the proceedings that may occur under the Commission's proposed section 1212(e). Section 1212(e) as proposed would allow the Presiding Member to use informal hearing procedures as set forth in Government Code Section 11445.19 *et seq.* As a general statement, IEP favors giving the Committee substantial discretion to facilitate meaningful public participations. However, at the extreme, there is some concern that without more definition of the proposed use of the Section 11445.10 procedures, Applicants might face two separate sets of hearings: both formal evidentiary hearings and “informal” hearings with the potential to affect the outcome of the proceedings. While the intent of the Committee is to avoid such duplication, IEP remains concerned about the potential for expanding the proceedings. IEP

¹ In fact, the Commission's strict limitation of communications with decisionmakers is another hurdle to the public interest in fair, impartial, and timely decisionmaking. Thus, beyond clarifying the Staff's position as an independent party, IEP respectfully suggests that the Commission may wish to consider in this rulemaking, revising its regulations to allow communications with decisionmakers, subject to the noticing requirements similar to those used by the California Public Utilities Commission. (See CPUC Rules of Practice and Procedure, Rules 7 and 7.1.)

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has reviewed the Government Code section 11445.10 provisions related to informal hearings and has the following comments and concerns.

First, given the Commission's well-established precedent for routinely granting intervention and its practice of accepting public comment during all hearings, including evidentiary hearings, it is not clear to IEP that the reference to Section 11445.10 is even necessary. That is, IEP believes that the Commission has existing authority and discretion to allow both parties and non-parties to provide input during proceedings, up to and including evidentiary hearings, the proposed decision, and the final decision by the full Commission. Thus, the provisions set forth in 11445.10 may in fact be unnecessary given the Commission's well founded practices and precedents affording extraordinary opportunities for public participation.

Second, it is not clear whether the application of 11445.10 procedures would be limited to those cases only in which there are "no disputed issues of material fact," as set forth in Section 11445.20. If the Committee intends to limit the use of informal proceedings to those in which there are no disputed issues of material fact, again IEP believes that the public comment procedures may be sufficient.

Third, IEP is generally concerned that section 11445.10 provisions may in fact result in expanded hearings, creating a possibility of both formal and informal proceedings in the siting process. While IEP continues to be strongly supportive of efforts to streamline the siting process consistent with the public interest and public participation, IEP is concerned that the Section

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11445.10 provisions could be abused and misused by parties who would seek to have informal hearings in addition to the formal hearings provided by the Committee.

IEP understands that the Committee is seeking to make the siting process more accessible to members of the general public. Towards that end, IEP will continue to work with the Committee to better understand the Committee's intentions and to help elucidate how the Section 11445.10 procedures might be employed to serve the public interest.

Comments on Staff's Proposed Changes to the Siting Regulations. Because IEP's positions on most issues addressed in Staff's comments are discussed above, IEP will comment only briefly on the Staff's suggested modifications to the siting regulations.

First and foremost, with regard to section 1710(a), IEP believes that Staff's proposed language sends the wrong signal to the public. Specifically, Staff has proposed that conferences, meetings, workshops and site visits need not be publicly noticed except where a party or other government agency wishes to negotiate with respect to one or more substantive issues. IEP respectfully suggests that the term "negotiate" clouds the public's understanding of the Staff's role as an independent party. As an independent party in the proceeding, Staff is not in the position to negotiate outcomes with any party; Staff makes recommendations for the Committee's consideration. The word "negotiate" has the connotation that the Staff is a decisionmaker with the authority to bind the Commission. This is simply not the case. Accordingly, IEP respectfully suggests that the Commission not consider Staff's suggested changes to 1710(a).

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Similarly, Staff's proposed revisions to section 1718 include discussions of negotiations with respect to substantive issues. IEP once again reiterates that Staff is not in the position to negotiate with any party with respect to any issues. Similarly, the term "substantive issues" creates further confusion for the public. The difference between substantive issues and procedural matters can be, for some, arguably a matter of degree and not kind. Accordingly, IEP respectfully suggests that the Committee enact a bright line that recognizes no restrictions on informal communications between all parties, including Staff as an independent party.

Conclusion. Thank you very much for your time and consideration. IEP looks forward to continuing to work with the Committee on this important issue.

Sincerely,

A handwritten signature in cursive script that reads "Jeff Harris" followed by a stylized flourish.

Jeffery D. Harris
Ellison, Schneider & Harris, LLP

Attorneys for the Independent Energy Producers
Association